



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

5 Post Office Square, Suite 100

Boston, MA 02109-3912

APR 23 2012

Kevin M. Cassidy, Esq.
Staff Attorney
Pacific Environmental Advocacy Center – East
P.O. Box 445
Norwell, MA 02601

Re: FOIA Request 01-FOI-00209-11

Dear Mr. Cassidy:

This letter provides the final response of the Region 1 office (Region 1) of the United States Environmental Protection Agency (EPA) to the above-referenced request for records under the Freedom of Information Act (FOIA), with the exception that we are unable to make a final decision at this time with regard to a single potentially responsive record that is discussed below. You sent this FOIA request to Region 1's Freedom of Information Officer on September 12, 2011. Your request seeks records pertaining to Region 1's development of a new draft National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act (CWA) for the Merrimack Station power plant in Bow, New Hampshire (Merrimack Station). The facility is owned and operated by Public Service of New Hampshire (PSNH).

Region 1 has previously partially responded to your FOIA request through a number of letters and emails. In conjunction with these communications, the Region has made a large number of potentially responsive records available to you. On December 21, 2011, the Region sent you a letter explaining that we had made available all potentially responsive records in its possession, as narrowed by prior agreement, except for the following five records (or groups of records):

1. PSNH's responses to items 5 and 9 of Region 1's October 29, 2010, information request letter (*see* Administrative Records (AR) 36, 43 and 840);¹
2. the Flue Gas Desulfurization (FGD) Wastewater Treatment System (WWTS) flow mass balance submitted with an email from PSNH to Region 1 on May 12, 2009 (*see* AR 496);

¹ PSNH's letter of December 3, 2010, AR 43, indicates that its responses to Items 5 and 9 of EPA's information request letter would be submitted to Region 1 under separate cover on December 8, 2010. Consistent with that, PSNH submitted the responses to items 5 and 9 on December 8, 2010. *See* AR 840.

3. the FGD WWTS mass balance (minimum and maximum flows) submitted with an email from PSNH to Region 1 on May 15, 2009 (*see* AR 497);
4. two engineering diagrams of the FGD WWTS (1. process flows, and 2. hydraulic profile) submitted with an email from PSNH to Region 1 on May 14, 2009 (*see* AR 498); and
5. CBI industry responses to EPA's "Questionnaire for the Steam Electric Power Generating Effluent Guidelines" (grouped as AR 683) (as previously indicated by Region 1, these materials are not in Region 1's possession but are, instead, maintained by EPA Headquarters).

The records included in the first four items were submitted to Region 1 by PSNH, whereas the records in the fifth item were submitted to EPA Headquarters by a variety of businesses. While Region 1 possesses the records in the first four items, the records that comprise the fifth item are in the possession of EPA Headquarters and are not, and have never been, in the possession of Region 1.²

As our December 21, 2011, letter explained, the above records were all withheld from disclosure under FOIA Exemption 4 pertaining to trade secrets and confidential business information (CBI). *See* 40 C.F.R. § 2.105(a)(4). In accordance with 40 C.F.R. § 2.204(d)(1)(ii), Region 1 withheld these records because it had determined that the information might be entitled to confidential treatment under Exemption 4. *See* 5 U.S.C. § 552(b)(4) and 40 C.F.R. Part 2, Subpart B. The Region indicated that it was "initially" denying your request for these records under 40 C.F.R. § 2.204(d)(1)(ii), and that it would issue a final determination after further evaluation regarding the applicability of Exemption 4.

Region 1's Office of Regional Counsel (ORC) has now made final confidentiality determinations regarding each of the records included in the first four items listed above. *See* Attachment A to this letter (April 18, 2012, Letter from Carl F. Dierker, Regional Counsel, EPA Region 1, to Linda T. Landis, Senior Counsel, PSNH). The confidentiality determinations for each of the above-listed records (or groups of records) are described below.

1. *Item 1*: On December 8, 2010, PSNH sent Region 1 a transmittal letter together with its responses to Items 5 and 9 of Region 1's October 29, 2010, information request letter. *See* AR 840. In the transmittal letter, PSNH designated all of its responses to Items 5 and 9 as trade secret information and CBI. *Id.* The individual parts of PSNH's responses to Items 5 and 9 are discussed below.

² Although these records have never been in the possession of Region 1, the Region included them in the Administrative Record for the new draft NPDES permit for Merrimack Station, *see* AR 683, because they were cited by Region 1 in its "Determination of Technology-Based Effluent Limits for the Flue Gas Desulfurization Wastewater at Merrimack Station in Bow, New Hampshire" (Sept. 23, 2011), *see* Attachment E to the draft permit Fact Sheet, at p. 29, n. 16 and n. 17. Specifically, they were cited as references for information provided to Region 1 by EPA Headquarters and discussed in the Region's analysis. *See id.* *See also* AR 118.

- a. PSNH's response to Item 5 is comprised of certain text and an attachment thereto (Attachment 2), which includes a flow diagram of wastewater treatment technology proposed to PSNH by a vendor. Region 1 has determined that this material is exempt from disclosure under Exemption 4 as trade secret information and CBI. *See* Attachment A to this letter.
 - b. PSNH's response to Item 9 is comprised of certain text and an attachment thereto (Attachment 4) consisting of 7 separate documents.
 - i. After exchanging further correspondence regarding the confidentiality of these records, Region 1 and PSNH agreed that documents 3, 4, 6 and 7 of Attachment 4 are neither trade secrets nor CBI at present. Therefore, as Region 1 previously informed you in recent emails, the Region grouped PSNH's transmittal letter and these four non-exempt documents together as AR 840 and made the material publicly available on the Region's website.
 - ii. Region 1 also determined, however, that the text of PSNH's response to Item 9 as well as documents 1, 2 and 5 of Attachment 4 are exempt from disclosure under Exemption 4 as trade secret information and CBI. Document 1 includes vendor "pilot and bench scale" reference data regarding mercury removal by the vendor's proprietary treatment media, document 2 is a vendor "product data sheet" for certain proprietary treatment media, and document 5 is another vendor "product data sheet" for certain proprietary treatment media.
2. Region 1 has determined that the attachment to AR 496 (presenting projected mass balance data for the FGD WWTS to be installed at Merrimack Station) is exempt from disclosure under Exemption 4 as trade secret information and CBI.
 3. Region 1 has determined that the attachment to AR 497 (presenting projected mass balance data for the FGD WWTS to be installed at Merrimack Station) is exempt from disclosure under Exemption 4 as trade secret information and CBI.
 4. Region 1 has determined that the attachment to AR 498 (presenting a projected process flow diagram and a projected hydraulic profile for the FGD WWTS to be installed at Merrimack Station) is exempt from disclosure under Exemption 4 as trade secret information and CBI.

Based on these determinations, I am now making a final decision to withhold the trade secret and/or CBI records described immediately above from disclosure in response to your FOIA request. These records are being withheld under FOIA Exemption 4. *See* 5 U.S.C. § 552(b)(4); 40 C.F.R. § 2.105(a)(4). I am making this decision based on the confidentiality determination set forth in Attachment A and the advice and counsel of

Mark Stein of Region 1's Office of Regional Counsel, and after input and recommendations from my staff within the Office of Ecosystem Protection.

With regard to the fifth item listed above (*i.e.*, AR 683), Region 1 is not in a position to make a final decision with regard to these records because they are not, and have never been, in the Region's possession. They are in the possession of EPA Headquarters and Headquarters must make a final decision regarding these documents. Region 1 will work with Headquarters to reach a decision as quickly as possible.

If you are dissatisfied with the above adverse determination of this office in response to your request for records under the FOIA, you may appeal that determination to the Headquarters Freedom of Information Staff, Records, Privacy and FOIA Branch, Office of Information Collection, Office of Environmental Information, Environmental Protection Agency, 1200 Pennsylvania Avenue (2822T), NW., Washington, DC 20460; e-mail: hq.foia@epa.gov. Any such appeal must be made in writing and be submitted to the Headquarters Freedom of Information staff no later than 30 calendar days from the date of this letter denying the request. The Agency will not consider appeals received after the 30-day limit. The appeal letter may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed (including the assigned FOIA request number, if known). For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

If you have any questions about the above response to your FOIA request, please call Mark Stein of Region 1's ORC (at 1-617-918-1077). Thank you for your cooperation.

Sincerely,



Stephen S. Perkins, Director
Office of Ecosystem Protection

cc: Cristeen Schena, EPA Region 1 FOIA Officer
Damien Houlihan, EPA Region 1, OEP
John King, EPA Region, OEP
Mark Stein, EPA Region 1, ORC
Yen Hoang, EPA Region 1, ORC



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

5 Post Office Square, Suite 100

Boston, MA 02109-3912

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

April 18, 2012

Linda T. Landis, Senior Counsel
Legal Department
Public Service Company of New Hampshire
780 No. Commercial Street
Manchester, NH 03101

**Re: Final Determination Concerning the Application of Exemption 4 to Certain
Information Submitted to EPA and Responsive to FOIA Request No. 01-
FOI-00209-11**

Dear Ms Landis:

I. BACKGROUND

The Region 1 office (Region 1 or the Region) of the United States Environmental Protection Agency (EPA or the Agency) is working to develop a new National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act (CWA) for the Merrimack Station power plant in Bow, New Hampshire (Merrimack Station). Public Service of New Hampshire (PSNH), a subsidiary of the Northeast Utilities System, owns and operates Merrimack Station. In connection with Region 1's development of the new NPDES permit, PSNH has submitted many documents to the Region and has claimed that some of these records constitute trade secrets and/or Confidential Business Information (CBI) exempt from release under Exemption 4 of the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4). *See also* 40 C.F.R. § 2.105(a)(4) ("Trade secrets and commercial or financial information obtained from a person and privileged or confidential" are exempt from mandatory disclosure under the FOIA).

On September 12, 2011, Region 1 received the above-referenced request for records under the Freedom of Information Act (FOIA) from the Conservation Law Foundation (CLF). This FOIA request seeks certain records related to the treatment of wastewater from new flue gas desulfurization (FGD) scrubbers at Merrimack Station. Some of the records claimed as trade secrets and/or CBI by PSNH are responsive to this FOIA request. Region 1 has not yet released any of the records claimed as trade secrets and/or CBI by PSNH, but the Region must make a final determination as to whether these

records are exempt from disclosure under Exemption 4 and should continue to be withheld, or are neither trade secrets nor CBI and must be released in response to the FOIA request.

Accordingly, on December 19, 2011, Region 1 sent you a letter requesting that PSNH submit information to substantiate its claims regarding the application of Exemption 4. Region 1's letter identified the following four records or groups of records claimed as trade secrets and/or CBI that are also responsive to the FOIA request:

1. The Attachment (FGD Mass Balance Analysis) to Administrative Record No. 496 (a May 12, 2009, email from Alan Palmer of PSNH to John King of EPA Region 1);
2. The two Attachments (FGD Mass Balance Analysis) to Administrative Record No. 497 (a May 15, 2009, email from Alan Palmer of PSNH to John King of EPA Region 1);
3. The two Attachments (FGD wastewater treatment Process Flow Diagram; and FGD wastewater treatment Hydraulic Profile) to Administrative Record No. 498 (a May 14, 2009, email from Alan Palmer of PSNH to John King of EPA Region 1); and
4. The sections of PSNH's December 3, 2010, response letter (*see* Administrative Record No. 43) that respond to items 5 and 9 of EPA's October 29, 2010, information request letter (*see* Administrative Record No. 36).¹

On January 6, 2012, you sent a letter responding to Region 1. Your letter subdivides the records designated as trade secrets and/or CBI into three groups: "Group 1" includes the records in items 1 and 2 above, "Group 2" includes the records in Item 3 above, and "Group 3" includes the records described in Item 4 above.

II. CBI CLAIMS WITHDRAWN AS TO CERTAIN RECORDS

Your letter indicates that the Group 3 records include, among other things, an attachment to PSNH's response to item 9 of EPA's October 29, 2010, information request letter, which is labeled as "Attachment 4." PSNH submitted this material to EPA together with a letter dated December 8, 2010. Your letter further indicates that Attachment 4 is comprised of 7 separate documents, and that document number 7 ("GFH Media Arsenic Removal Brochure") is *not* confidential and PSNH is not claiming it to be CBI. In addition, in response to follow-up inquiries from Region 1, you indicated that PSNH was withdrawing its CBI claims as to document numbers 3, 4 and 6 of Attachment 4. *See* March 13, 2012, Email from Linda Landis, PSNH, to Mark Stein, EPA Region 1; April

¹ While the December 3, 2010, response letter from PSNH mentions its responses to items 5 and 9 of EPA's earlier information request letter, those responses were actually submitted to EPA under separate cover on December 8, 2010 (*see* Administrative Record No. 840).

4, 2012, Email from Linda Landis, PSNH, to Mark Stein, EPA Region 1. As a result, Region 1 has added PSNH's December 8, 2010, transmittal letter and Documents 3, 4, 6 and 7 of Attachment 4 to Response 9 to the Region's Administrative Record for the new Draft NPDES Permit for Merrimack Station. These materials are grouped together as Administrative Record No. 840.

III. FINAL DECISION ON THE APPLICATION OF EXEMPTION 4

Exemption 4 of the FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). *See also* 40 C.F.R. § 2.105(a)(4) ("Trade secrets and commercial or financial information obtained from a person and privileged or confidential" are exempt from mandatory disclosure under the FOIA). Thus, in order for information to meet the requirements of Exemption 4, EPA must find that the information is either (1) a trade secret; or (2) commercial or financial information obtained from a person and privileged or confidential (commonly referred to as "Confidential Business Information" ("CBI")).

I have carefully considered the claims submitted by PSNH that the above-listed records should be considered to be trade secrets and/or CBI, including the justifications presented in its January 6, 2012, substantiation letter. For the reasons stated below, I find that these records are trade secret information and/or CBI and are entitled to confidential treatment and should be withheld from public release under Exemption 4 of the FOIA.

A. Initial Considerations

EPA regulations at 40 C.F.R. § 2.208 state that, in order for business information to be entitled to confidential treatment, the Agency must have determined, *inter alia*, that:

- (1) the business has asserted a claim of confidentiality with regard to that information and the claim has not expired, been waived or been withdrawn;
- (2) the business has shown that it has taken reasonable measures to protect the confidentiality of the information and intends to continue taking such measures;
- (3) the information is not, and has not been, reasonably obtainable by a third party without the business' consent through legitimate means; and
- (4) no statute specifically requires disclosure of the information.

In its substantiation letter, PSNH stated (at p. 5) that it sought confidential treatment for the specified information "permanently, or at least until an end date which we cannot identify at this time." In addition, PSNH indicated that no interceding events have negated its trade secret and CBI claims and the information has not become stale. Region 1 finds that PSNH's substantiation letter (at p. 5) demonstrates that it and Siemens have taken measures to maintain and preserve the confidentiality of the information and third parties could not readily obtain access to it. Finally, in its analysis of this matter, EPA

found no reason to doubt these assertions by PSNH.² As a result, I must determine whether the information in question meets the definition of trade secret and/or CBI.

B. Trade Secrets

a. Background

The definition of "trade secret" under the FOIA is limited to "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition requires that there be a "direct relationship" between the trade secret and the production process. *Id.*

b. Discussion

In its substantiation letter (at p. 2), PSNH claims that the following materials constitute trade secret information under FOIA Exemption 4:

- a) information found in Groups 1 and 2, described above, related to a proprietary wastewater treatment system proposed for use at Merrimack Station and the specific projected operations of components of that equipment; and
- b) information found in Group 3, described above, related to a patented adsorbent media proposed to be used as part of the wastewater treatment system at Merrimack Station.

The information claimed to be trade secret by PSNH all relates to the design and operation of proprietary wastewater treatment technology developed and offered for sale to PSNH by Siemens. It is Region 1's understanding that PSNH ultimately purchased and installed the equipment to use in treating wastewater from Merrimack Station's wet flue gas desulfurization (FGD) scrubber system.

With regard to the material in Groups 1 and 2, PSNH explained in its substantiation letter (at p. 6) that:

Attachments in Groups 1 and 2 contain calculations related to the operations of vendor-proprietary technology. The specific components that comprise this proprietary equipment and resulting operational projections are confidential technical information. If this information were disclosed, it would severely damage the vendor in a highly competitive market.

² To be clear, after analyzing the records initially claimed as trade secret and/or CBI by PSNH, Region 1 did have questions about whether certain of the records met the relevant criteria. These questions were resolved, however, and, as detailed above, PSNH ultimately agreed that several of these records were not trade secret or CBI information.

Group 2 also includes a process flow diagram and hydraulic profile that provides information regarding the design and operational characteristics of the wastewater treatment system proposed by Siemens.

With regard to the material in Group 3, PSNH indicates (at p. 2) that "the information ... related to the patented adsorbent media would be protected from disclosure" as trade secrets. PSNH explains (at pp. 3 and 7) that these Group 3 materials include "engineering plans such as the Process Flow diagram" for the proprietary FGD wastewater treatment system, as well as other proprietary technical data related to this treatment system.³

In its analysis of this matter, EPA has not found any reason to doubt PSNH's assertions with regard to the confidentiality and value of the information and its relationship to the proprietary treatment process developed by Siemens and used by PSNH at Merrimack Station. PSNH explained how the information claimed as trade secret is directly related to the proprietary wastewater treatment process sold by Siemens to PSNH for use at Merrimack Station, and described the unique property and value that the information represents with regard to demonstrating the manner of the treatment system's operation.⁴ PSNH also explained that disclosing the information would reveal information about the operation of the treatment system that would damage both Siemens and PSNH if disclosed. PSNH has demonstrated that disclosing the requested information could allow the identification of a secret and commercially valuable process used for treating wastewater.

c. Conclusion

Therefore, I conclude the information qualifies as a trade secret and is therefore exempt from disclosure under Exemption 4 of the FOIA.

C. Confidential Business Information ("CBI")

a. Background

Whether or not the information at issue is exempt from disclosure as trade secret material, it may nevertheless be exempt from release under Exemption 4 of the FOIA if it

³ The substantiation letter explains that the Process Flow diagram is labeled as Attachment 2 to PSNH's Response 5 to EPA's October 29, 2010, information request letter, while the other proprietary technical data that is part of Group 3 is labeled as Attachment 4 (documents 1, 2, 4, and 5) to PSNH's Response 9 to the information request letter. PSNH later agreed that document 4 of Attachment 4 to Response 9 is not CBI at this time.

⁴ EPA has also determined that under 40 CFR § 2.302(a)(2)(ii), none of the data claimed as trade secret information is "effluent data" that must be disclosed under the FOIA. Region 1 has been able to disclose other information adequate to allow the Region to "demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation." *Id.*

constitutes CBI (*i.e.*, "commercial or financial information obtained from a person and privileged or confidential"). 5 U.S.C. § 552(b)(4). *See also* 40 C.F.R. § 2.105(a)(4). To begin with, PSNH meets the definition of the term "person," as defined by EPA's regulations at 40 C.F.R. § 2.201(a). In addition, the terms *commercial* and *financial* "should be given their ordinary meanings" for purposes of Exemption 4 of the FOIA. *Public Citizen*, 704 F.2d at 1290 (citing *Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C. Cir. 1982)). Therefore, information pertaining to a business is covered by the definition of commercial information.

The information in question here (*i.e.*, the materials in Groups 1, 2 and 3) was obtained from PSNH and pertains to PSNH's business (as well as to Siemens' business) and meets the definition of "commercial information."⁵

Finally, in order to qualify as CBI, the information must be "privileged or confidential." PSNH has claimed that the information in Groups 1, 2 and 3 is confidential, but has not claimed it to be privileged. Region 1 has no indication that the information is subject to a common-law privilege and, therefore, limits the discussion below to the issue of confidentiality.

b. Discussion

i. Submission of the Information Was Not Voluntary, It Was Required

For the purpose of this analysis, there are two key categories of potentially confidential information: (1) information submitted *voluntarily* to the Government, and (2) information *required* to be submitted to the Government. Under EPA's regulations at 40 C.F.R. § 2.201(i), business information is considered to have been voluntarily submitted if EPA had no statutory or contractual authority to require its submission, and its submission was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage) under a regulatory program of general applicability, such as a permitting program. Information submitted to the Government on a voluntary basis "is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993). Nondisclosure of voluntarily submitted information serves the governmental interest in ensuring the availability of such information in the future and the private interest in protecting information that "for whatever reason, 'would customarily not be released to the public by the person from whom it was obtained.'" *Id.* at 878.

⁵ Exemption 4's reach is "sufficiently broad to encompass financial and commercial information concerning a third party" and protection is available regardless of whether the commercial information pertains directly to the interests of the party that provided it or to a third party's interests. *Bd. of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 405 (D.C. Cir. 1980). *See also Critical Mass Energy Project v. NRC*, 830 F.2d 278, 281 (D.C. Cir. 1987) (citing *Bd. of Trade*).

An information submission is considered to have been required if a law affirmatively required the submission or gave the Agency authority to require it. Only actual legal authority – not the requester's intent or the submitter's belief – is to be considered in determining whether a submission is required or voluntary. *Center for Auto Safety v. NHTSA*, 244 F.3d 144, 149 (D.C. Cir. 2001). Furthermore, it is not enough that the Agency possess the authority to require submission; it must exercise its authority. At the same time, however, information can be "required" to be submitted by a broad range of legal authorities, including informal mandates that call for submission as a condition of doing business with the government. Information that is required to be submitted to the Government is confidential if its "disclosure would be likely either '(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'" *Critical Mass*, 975 F.2d at 878 (quoting *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted)). Nondisclosure of information that was required to be submitted serves the governmental interest in ensuring the continued *reliability* of the information and the submitter's interest is avoiding "commercial disadvantage" or "competitive injury." *Id.*

PSNH's substantiation letter (at p. 8) states that it submitted the Group 3 material pursuant to a requirement imposed by Region 1. Region 1 agrees given that PSNH submitted the Group 3 material in response to an information request letter sent to PSNH by the Region pursuant to Section 308 of the Clean Water Act.

With regard to the material from Groups 1 and 2, PSNH's substantiation letter is less clear but seems to suggest that this information was submitted voluntarily. If this was the intent of PSNH's substantiation letter, Region 1 disagrees. The Region concludes that submission of the Group 1 and Group 2 information was required.⁶ Although this material was not submitted in response to an information request letter issued by the Region under Section 308 of the Clean Water Act, it was submitted in response to less formal requests from both Region 1 and the New Hampshire Department of Environmental Services (NH DES). See Administrative Record Nos. 440, 437, 426, 493, 753, 496, 497 and 498. The agencies needed this information, in essence, to supplement PSNH's permit application to provide information regarding PSNH's planned FGD

⁶ Even if the Group 1 and Group 2 material had been submitted voluntarily, however, the Region would have reached the same conclusion regarding whether it constituted CBI exempt from disclosure under the FOIA. Information that is voluntarily submitted to the Agency must be withheld under Exemption 4 of the FOIA if "it is of a kind that would customarily not be released to the public." *Critical Mass*, 975 F.2d at 879. The Agency's review must be objective and "must meet the burden of proving the provider's custom." *Id.* PSNH indicates that the Group 1 and Group 2 information is not customarily disclosed or made available to the general public, and has not been so disclosed in this case. Indeed, PSNH has explained that all of this material is the subject of a private confidentiality agreement with Siemens, and that PSNH and Siemens have gone to significant lengths to preserve its confidentiality. See Substantiation Letter at p. 5. In its analysis of this matter, EPA has not found any reason to doubt these assertions by the Company. Therefore, I find that the Company has not customarily disclosed the information. As a result, even if it had been voluntarily submitted to Region 1, it would be withheld from disclosure under Exemption 4 of the FOIA.

wastewater discharges that would enable the agencies to develop the new draft NPDES permit for Merrimack Station. *Id.* EPA is authorized to request this type of information under Section 308. (EPA later requested additional information related to future FGD wastewater discharges both informally and pursuant to a CWA § 308 information request letter. *See* Administrative Record Nos. 38, 36.) PSNH, in turn, needed to submit the information in order to obtain its new NPDES permit, as submission of this sort of information is required as part of an NPDES permit application. *See* 40 C.F.R. § 122.21(g). In light of the above facts and considerations, Region 1 concludes (1) that it had the authority to require the submission of the information and that it exercised this authority, (2) that submission of the information by PSNH was a condition of it obtaining a permit, and (3) that submission of the Group 1 and Group 2 material was required.

The Region concludes that submission of the Group 1 and Group 2 information was required.

ii. Public Disclosure of the Business Information that PSNH was Required to Submit to Region 1 would cause substantial harm to the competitive position of both PSNH and Siemens

As discussed above, the test for confidentiality of commercial or financial information that is required to be submitted to the Government was spelled out in *National Parks*, 498 F.2d at 770. Under *National Parks*, commercial or financial information that is required to be submitted to the Government is "confidential" if "disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *Id.* at 770 (footnote omitted). The inquiry into whether the Government's ability to obtain necessary information that is required to be submitted in the future will be impaired focuses on the likelihood that the Government will receive *accurate* information in future submissions. As a result, "[i]f the government can enforce the disclosure obligation, and if the resultant disclosure is likely to be accurate, that may be sufficient to prevent any impairment." *Washington Post*, 690 F.2d at 268. In this case, EPA not only has the authority to require the submission of information, but it also has enforcement authorities that help ensure the accuracy of the submissions. *See* 33 U.S.C. §§ 1318(a) and 1319; 40 C.F.R. §§ 122.22(a)(1) and (d). Therefore, Region 1 concludes that disclosing the information is unlikely to impair the Government's ability to obtain necessary information in the future.

Turning to the "competitive harm" side of the test, EPA regulations at 40 C.F.R. § 2.208(e)(1), provide that required business information is entitled to confidential treatment if, among other things, "[t]he business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position." To meet the competitive harm test, it is not enough to show that the release of the information would likely cause *some* or *any* potential for competitive harm. Rather, the business seeking confidential treatment must demonstrate a likelihood of *substantial*

competitive harm in order to overcome FOIA's strong presumption of disclosure. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988). In this regard, the business must explain why release of the information would be likely to cause substantial harm to its competitive position, the nature of the harmful effects, why they should be viewed as substantial, and the causal relationship between disclosure and the harmful effects. In addition, the Company must explain how its competitors could make use of this information to the Company's detriment.

PSNH's substantiation letter adequately explains how public disclosure of this information could substantially harm its competitive position as well as that of Siemens. As discussed above, PSNH indicates that the information at issue includes engineering plans and projections of operational performance data pertaining to the proprietary FGD wastewater treatment technology designed by Siemens and evaluated and purchased by PSNH. See Substantiation Letter at pp. 3, 6. All of this information is unique to Siemens and some of it is also unique to PSNH, as it pertains to Merrimack Station's wastewater streams. This information includes the Process Flow diagram and Hydraulic Profile diagram in Group 3, as well as the data in Groups 1 and 2 that reflect projections of possible operational performance.⁷ PSNH indicates that all of this is confidential technical information and its public disclosure would harm PSNH and Siemens in the marketplace. *Id.* at 3, 6. PSNH and Siemens have kept this information confidential, even entering confidentiality agreements pertaining to this material. See *id.* at p. 5. Public release of this information could, as PSNH's substantiation letter points out (at pp. 3), "seriously undermine a company's competitive advantage by allowing competitors access to ideas that they would not have had or would have had to spend considerable funds to develop on their own" (citing *SMS Data Products Group, Inc. v. U.S. Dept. of Air Force*, 1989 WL 201031, 3 (D.D.C. 1989)). See also Substantiation Letter at 5, 7-8. The market for FGD wastewater treatment is highly competitive and releasing information about the design and performance of proprietary treatment technology could give an unfair advantage to the competitors of both PSNH and Siemens, who could gain valuable information without have to pay the costs reflecting research and development efforts that would be necessary otherwise. *Id.* at 7-8.

After careful consideration of PSNH's arguments, Region 1 finds that PSNH has demonstrated that public release of any of the information in Groups 1, 2 or 3, for which the company is seeking confidential treatment would be likely to cause significant competitive harm to it and Siemens. PSNH has shown that the information in question is highly sensitive to both its and Siemens' commercial operations, that public release of the requested information would likely result in financial benefits to the competitors of both PSNH and Siemens, and that PSNH and Siemens would suffer substantial competitive injury as a result. Conferring competitive advantages and disadvantages to competing businesses is not the desired purpose of the FOIA. *Worthington Compressors, Inc. v.*

⁷ As indicated above in the discussion of trade secrets, EPA has determined that under 40 CFR § 2.302(a)(2)(ii), none of the data claimed as CBI is "effluent data" that must be disclosed under the FOIA. Region 1 has been able to disclose other information adequate to allow the Region to "demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation." *Id.*

Costle, 662 F.2d 45, 51-53 (D.C. Cir. 1981). Exemption 4 of the FOIA, therefore, protects those who are required to submit confidential commercial or financial information to a Government agency from the competitive disadvantages that may result from public disclosure of that information. *Id.*

Pursuant to EPA's regulations at 40 C.F.R. §§ 2.204(f)(6) and 2.204(f)(9), the appropriate Region 1 program office has been consulted about whether PSNH's claim of confidentiality is valid. The Region 1 program office supports the Company's assertions that it faces actual competition and would likely suffer significant competitive injury if the information were not kept confidential. Region 1 also expects that EPA has in the past found this type of information to be CBI that should be withheld from disclosure under Exemption 4 of the FOIA.

In sum, because the Company has explained specifically how disclosure of the information would likely cause substantial competitive harm to the Company, the Company has supported its claim and the information is confidential under Exemption 4 of the FOIA.⁸

iii. Conclusion

I find that the information claimed to be CBI in Groups 1, 2 and 3 is entitled to confidential treatment and must be withheld from release under Exemption 4 of the FOIA.

Should you have any questions concerning this decision, please call Mark Stein of my staff at (617) 918-1077.

Sincerely,



Carl F. Dierker
Regional Counsel

⁸ Region 1 notes that PSNH also argued that the material in Groups 1, 2 and 3 should be found to be CBI because it was subject to a private confidentiality agreement between PSNH and Siemens. PSNH also argued that it would suffer injury if the material was released in contravention of its confidentiality agreement with Siemens, both because it might face an action for damages for breach of the agreement and because it would undermine their relationships and access to potential vendors by indicating that PSNH might be incapable of protecting confidential business information. While the companies' confidentiality agreement helps to evidence that PSNH and Siemens have kept this material confidential, and is suggestive of the value that the two companies place in maintaining this confidentiality, Region 1 does not believe that a private confidentiality agreement is an independent basis for determining that the information constitutes CBI or trade secret information that should be withheld from disclosure under Exemption 4 of the FOIA. A private confidentiality agreement cannot trump the public disclosure requirements of the FOIA to the extent that they apply to particular records. For example, where the FOIA requires the release of particular types of effluent data if requested by a person under the FOIA, *see* 40 C.F.R. § 2.302, a private confidentiality agreement cannot overcome that requirement.

CBI Determination for Certain Information
Responsive to FOIA Request No. 01-FOI-00209-11

cc: Kevin M. Cassidy, Esq., Pacific Environmental Advocacy Center - East
Cristeen Schena, FOI Officer, EPA Region 1
Damien Houlihan, Office of Ecosystem Protection, EPA Region 1
John King, Office of Ecosystem Protection, EPA Region 1
Mark Stein, Office of Regional Counsel, EPA Region 1

